IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA ex rel.;
CORI RIGSBY; AND KERRI RIGSBY — RELATORS/COUNTER-DEFENDANTS

v. — CASE No. 1:06-cv-433-LTS-RHW

STATE FARM FIRE & CASUALTY
COMPANY, et al. — DEFENDANTS/COUNTER-PLAINTIFFS

RELATORS' OPPOSITION TO STATE FARM'S
MOTION [878] TO CERTIFY THE COURT'S ORDER AND MEMORANDUM
OPINION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Cori and Kerri Rigsby ("Relators") respectfully submit this Opposition to State Farm's Motion to Certify the Court's Order and Memorandum Opinion for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) (docket entry [878]) ("Motion") and Memorandum in support thereof (docket entry [879]) ("Memorandum"), which were filed by State Farm Fire & Casualty Company ("State Farm") on February 7, 2011.

I. PRELIMINARY STATEMENT

After five years of hard-fought litigation, this case is now in its final chapter. State Farm accurately stated in a recent filing that "the parties have taken forty-four depositions, thousands of pages of documents have been produced, experts have produced reports and been deposed, and dozens of interrogatories have been asked and answered."[1] State Farm has filed numerous dispositive motions, and the Court has ruled on many of them. Despite State Farm's best efforts to delay the inevitable, material disputes of fact abound and trial is the only way to resolve them. The Relators have extensive evidence that will show how State Farm committed widespread,

[1] State Farm's Response Memorandum in Opposition to Relators' [738] Motion for Reconsideration, [766], at 17.

systemic fraud against the government. State Farm argues that the Relators are lying and that the evidence is false. It is now time for a jury to decide. Regardless of whether the Court orders the parties to proceed with one trial or two, the Relators respectfully submit that this entire matter can and should be completed very promptly, in months not years. Accordingly, State Farm soon will have the opportunity to appeal any and all of the Court's orders and the jury verdict after final judgment if the Relators prevail at trial.

Nonetheless, State Farm argues that it would be more efficient for the Court to certify for interlocutory appeal one of the many orders issued in this case: the Court's denial of summary judgment regarding alleged seal violations. State Farm's request easily could delay these proceedings for more than a year. If Relators were to prevail at trial after an interlocutory appeal, State Farm undoubtedly would appeal scores of other issues after trial. This is precisely the type of piecemeal litigation that the final judgment rule should prevent.

Accordingly, and for all of the other reasons set forth below, State Farm's motion should be denied.

II. ARGUMENT

A. Standards for Certification of Interlocutory Appeal.

This Court has sole discretion to determine whether an order should be certified for interlocutory appeal, and its determination is not subject to appeal. *See In Re Air Crash Disaster*, 821 F.2d 1147, 1167 (5th Cir. 1987) (noting that "[t]he decision to certify an interlocutory appeal pursuant to section 1292(b) is within the discretion of the trial court and unappealable"); 19 *Moore's Federal Practice Civil* § 203.32[1]. The party moving for certification "bears the burden to 'establish its right to such a procedure.'" *Bell v. Texaco, Inc.*, Civ. No. 5:09cv192KS-MTP, 2010 WL 3001181, at *1, *slip op*. (S.D. Miss. July 28, 2010) (citing *White v. Esmark Apparel, Inc.*, 788 F. Supp 907, 909 (N.D. Miss. 1992)).

Moreover, an interlocutory appeal is an exceptional remedy that is granted only in "extraordinary circumstances." *Pruett v. Thigpen*, No. EC84-31-LS-D, 1984 WL 3207 (N.D. Miss. January 10, 1985) (final judgment rule "avoid[s] the delay and extra effort of piecemeal appeals"). *See also Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997) ("exceptional circumstances" are necessary to warrant interlocutory appeal).[2] Mere "difficult rulings in hard cases" do not meet that requirement. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966).

The Court should not even consider certifying a matter for appeal unless it (1) presents a controlling question of law as to which there is substantial ground for difference of opinion and (2) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. 1292(b); *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d at 525. Set forth below and in reverse order, State Farm's Motion fails entirely to meet this standard.

B. Interlocutory Appeal Would Delay Resolution of the Case.

Courts repeatedly have rejected late-stage interlocutory appeals that would delay resolution of the litigation, noting that such delays are improper. *See Clark-Dietz and Associates-Engineers, Inc., v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (declining to accept matter certified for interlocutory appeal as "an immediate appeal may delay judgment" and would therefore retard, rather than advance, ultimate determination).[3]

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[2] *See also Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 525 (E.D.N.C. 2010) (interlocutory appeal appropriate only in "specific and limited circumstances.") (quoting *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370 n.5 (4th Cir. 2003)); *Lovelace v. Rockingham Memorial Hosp.*, 299 F. Supp. 2d 617, 623 (W.D. Va. 2004) (1292(b) appeal "should be used only sparingly"); *Van Scoy v. New Albertson's, Inc.*, No. 2:08-cv-02237-MCE-KJM, 2011 BL 33084 at *2 (E.D. Cal. February 9, 2011) (only "'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment'"), attached as Exhibit 1.

[3] *See also Blue Cross & Blue Shield of Rhode Island v. Korsen*, C.A. No. 09-317L, 2011 BL 13888, at *10 (D.R.I. January 19, 2011) (denying motion for certification even where "there exist substantial grounds for a difference of opinion" because "interlocutory appeal . . . would not advance the resolution of this lawsuit; on the contrary, it would delay its termination."), attached as Exhibit 2; *Greenwood v. Compucredit Corp.*, No. 08-04878 CW, 2011 BL 20041 (N.D. Cal. January 5, 2011) ("certification in this case would . . . delay resolution of the litigation."),

Courts have been especially unwilling to delay cases that have been ongoing for several years by permitting an interlocutory appeal. For example, after three years of litigation, the court in *Riley v. Dow Corning Corp.*, 876 F. Supp 728, 731 (M.D.N.C. 1992), held that "[c]ertification would only serve to further delay the trial process." In *Penthouse Owners Ass'n, Inc., v. Certified Underwriters at Lloyd's, London*, Civ. No. 1:07cv568-LTS-RHW, 2008 WL 2938066 (S.D. Miss. July 23, 2008), this Court denied certification of an order for interlocutory appeal where the matter was about to go to trial, holding that "[t]he case can be tried before the Fifth Circuit decides whether it will even permit an [interlocutory] appeal."

In addition, the policy against delaying proceedings through interlocutory appeals "is magnified in cases of heightened public concern." *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 151 (E.D.N.Y. 1999). This is especially so "where the litigants may have unequal economic resources," and delay would "prove advantageous to a well-financed litigant, and fatal to the less well-endowed." *Bryant v. Sylvester*, 57 F.3d 308, 311 n.4 (3d Cir. 1995). Courts should "be particularly sensitive to the feelings of lay people about what constitutes justice in . . . cases that are widely discussed." *Blue Cross & Blue Shield of New Jersey v. Philip Morris, Inc.*, 53 F. Supp. 2d 338, 346 (E.D.N.Y. 1999).

As set forth in the Preliminary Statement, State Farm's motion should be denied because an interlocutory appeal would do nothing more than further delay the trial that should occur soon. Relators are not aware of any other pending qui tam cases in the Fifth Circuit raising this issue, so the Court's ruling on seal violations will have no impact beyond this case. Hurricane Katrina hit the Gulf Coast five and one half years ago, so with each passing day, the risk of fading witness memories increases. The Court already has decided many dispositive motions,

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attached as Exhibit 3; *Fisons Ltd. v. United States*, 458 F.2d 1241, 1242 (7th Cir. 1972) ("special care must be taken to avoid the risk that a § 1292 appeal may actually impede, rather than expedite, conclusion of the entire case").

and State Farm will have ample opportunity to appeal this Court's decisions on any and all of them in short order – after final judgment and a jury verdict.

State Farm has expended tremendous resources with the goal of delaying or avoiding trial, as evidenced by the number of dispositive motions and motions to reconsider denials of those motions. This matter is one of great public concern and importance between parties of vastly differing resources. The Relators have maintained this action because they seek to vindicate the public interest by proving the existence of a massive fraud against the government. Accordingly, the Relators respectfully submit that the Court deny State Farm's dilatory motion and promptly proceed to trial, so all pending issues can be resolved expeditiously and by final order.

C. There is No Controlling Question of Law as to Which There is Substantial Ground for a Difference of Opinion.

While the Court need not even reach the remainder of the threshold test for interlocutory appeal, State Farm fails that part of the test as well. As set forth below, there is no controlling question of law at issue and no substantial ground for a difference of opinion.

1. This Court Already Decided that Determining Remedies for Seal Violations is Discretionary and Not a Question of Law.

When this Court determined that the remedy for violations of the FCA's seal requirement is not jurisdictional but rather is a matter within the discretion of the court, *see* Memorandum Opinion, [871], at 8, it also decided the issue does not present a controlling question of law. As many circuits, including the Fifth Circuit have held, a "legal question of the type envisioned in § 1292(b) . . . generally *does not include* matters within the discretion of the trial court." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002) (citing *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994) (emphasis added)); *see also Garner v. Wolfinberger*¸ 430 F.2d 1093, 1096-97 (5th Cir. 1970) (same).

Thus, to find that State Farm has presented a controlling question of law and to certify this matter for interlocutory appeal, the Court would need to revisit its prior ruling. It should decline to do so, because its earlier holding correctly recognizes that the FCA's seal requirement is not jurisdictional and thus is not a proper subject for interlocutory appeal.

2. There Are No Substantial Grounds for a Difference of Opinion.

a. This Court's Decision is Consistent with Almost Every Other Court to have Considered the Issue.

State Farm's entire motion hangs on the Sixth Circuit's *Summers* decision, which takes all discretion away from district courts and holds that the False Claims Act's sealing provisions are jurisdictional. This outlier decision from another circuit is not substantial grounds for a difference of opinion.

The Fifth Circuit has not yet addressed whether the sealing provisions of the False Claims Act are jurisdictional or discretionary. But the Fifth Circuit has not yet decided many legal issues, and this fact is not sufficient grounds to disrupt the final judgment rule. *See Morales v. Farmland Foods, Inc.*, No. 8:08CV504, 2011 BL 25881, at *10 (D. Neb. February 1, 2011) ("[T]he fact that the Eighth Circuit has not decided this issue is not sufficient to justify the interlocutory appeal."), attached as Exhibit 4. This is particularly true in this case, where the vast majority of other cases to have considered this issue have decided that the sealing provisions in the False Claims Act are not jurisdictional. *See, e.g., United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248 (S.D.N.Y. 1996) (citing *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995) and holding that case law addressing defendants' standing to challenge FCA claim based on procedural seal requirement is "sparse"); *United States ex rel. Stewart v. Alltech Servs., Inc.*, No. CV-07-0213-LRS, 2010 WL 4806829 (E.D. Wa. November 18, 2010) (seal

requirement is not jurisdictional, and its violation does not *per se* require dismissal); *In re Natural Gas Royalties Qui Tam Litigation*, 467 F. Supp. 2d 1117 (D. Wyo. 2006) ("substantial body of federal case law from other circuits" rejects the notion that dismissal is required for violation of seal); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000), *overruled on other grounds by United States v. Dialysis Clinic, Inc.*, No. 5:09-CV-00710 (NAM/DEP), 2011 WL 167246 (N.D.N.Y. January, 19, 2011) (dismissal should be reserved for cases involving "great harm" to interests promoted by seal); *Wisz ex rel. United States v. C/HCA Development, Inc.*, 31 F. Supp. 2d 1068 (N.D. Ill. 1998) (seal requirement is not jurisdictional); *United States v. Fiske*, 968 F. Supp. 1347 (E.D. Ark. 1997) (*in camera* filing/service requirement is not jurisdictional, absent bad faith on part of relator).

b. The 1914 *McCord* Decision cited in *Summers* Not Only Fails to Support State Farm's Position, but Actually Undermines State Farm's Reliance on *Summers*.

State Farm contends that *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914) "requires dismissal" of this action for the alleged seal violations. When State Farm relied on this argument for the first time at the January hearing, counsel for the Relators accurately pointed out that the case has nothing to do with the False Claims Act and provides no support for State Farm's argument. After the hearing, upon closer scrutiny of *McCord* and its progeny, it is clear that those cases actually undermine State Farm's position and its reliance on *Summers.*

McCord had nothing to do with the False Claims Act, but rather addressed the Heard Act, a statute that related to government contractors and subcontractors. Before the Heard Act's passage, a subcontractor had little recourse against a government contractor, since they could not

assert liens against property owned by the United States.[4] The Heard Act provided subcontractors the right to sue under surety bonds that contractors were required to post, provided that the subcontractor gave the United States a six month period to assert any prior claims. *McCord* held that the provision of the Heard Act requiring the subcontractor to wait six months after a project's completion to bring suit was jurisdictional. The Supreme Court found that the specific language of the Heard Act "clearly express[ed] the legislative intention" for the six-month requirement to be construed as jurisdictional. The Court affirmed dismissal of a complaint that was filed before the six-month period had expired. *See McCord*, 233 U.S. at 162-63.

But in two later decisions interpreting the Heard Act, the Supreme Court clarified and narrowed *McCord*'s application to other provisions of the Heard Act in a manner that supports this Court's holding that the FCA's seal requirement is not jurisdictional. First, in *United States ex rel. Alexander Bryant Co. v. New York Steam Fitting Co.*, 235 U.S. 327 (1914), the Supreme Court reversed a finding that the Heard Act's requirement of notice to all other subcontractors within one year of the project's completion was also jurisdictional. The Court explained that, unlike the provision requiring a subcontractor to wait six months before bringing suit, the "[t]he provision for notice . . . is not of the essence of jurisdiction over the case." *Id*. at 341.

Then, in *Fleisher Engineering & Construction Co. v. United States ex rel. Lenbeck*, the Court reversed a finding that the Heard Act's requirement that notice be given by certified mail was jurisdictional. 311 U.S. 15, 19 (1940). Summarizing its prior decisions in *McCord* and *New York Steam Fitting*, the Court explained that, "[i]n short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a

[4] Overview of the Miller Act Subcontractor Protection in Federal Projects, Luckey, John and Alane R. Allman, Congressional Research Service Report 97-751, available at http://congressionalresearch.com/97-751/document.php.

provision is of that character the statute must be liberally construed so as to accomplish its purpose." *Id*. at 18. Applying that test to the Heard Act's notice requirements, the Court explained that the purpose of the statutory requirement that notice be served by registered mail, was simply to assure receipt, not to make the described method mandatory so as to deny right of suit. Because the plaintiff fulfilled the notice requirement's purpose, albeit by first class mail instead of registered mail, the Court found that it still had jurisdiction over the plaintiff's claim.

Thus, *Fleischer* holds that courts should examine statutory language in light of the statute's "purpose" to determine whether Congress intended a statutory provision to be jurisdictional. 311 U.S. at 18. Accordingly, the balancing test applied to the FCA's seal provision in *United States ex rel. Lujan v. Hughes Aircraft Co.* is the correct approach because it follows this instruction. 67 F.3d 242, 245 (9th Cir. 1995).

In *Lujan*, the Ninth Circuit assessed the purpose of FCA's seal provision and found the requirement was adopted to "strike a balance between the purposes of qui tam actions and law enforcements needs." 67 F.3d at 245. The *Lujan* court noted that "the district court must keep in mind *both* sides of the balance when construing a sanction for a violation." *Id*. (emphasis added). The *Lujan* court fashioned a three-part test in which harm to the government serves as the paramount concern, in an attempt to preserve that balance and serve the seal provision's purpose. As the *Lujan* court and this Court found, if the government has not been harmed by an alleged seal violation, then the purpose of the statutory provision has been met.

State Farm attempts to reject the majority rule from *Lujan* by contending instead that the Sixth Circuit's approach in *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010) is correct because imposing the "*Lujan*-like balancing test on the unambiguous language of the FCA's sealing provision 'represents a form of judicial overreach' which

improperly invites the courts to 'second-guess' the balance that Congress has already struck when it enacted the FCA's seal requirement." [879] at 6 (citing *United States ex rel. Summers.*, 623 F.3d at 296). But in *Fleisher*, the Supreme Court found that the Heard Act's equally clear statutory language requiring notice to be provided by "registered mail, postage prepaid" was not jurisdictional. 311 U.S. at 18. The Supreme Court carefully analyzed the statutory language at issue and decided that Congress did not intend the "registered mail" requirement to be jurisdictional. *See id.*[5] The Supreme Court evidently did not deem that analysis to be a form of "judicial overreach" or "second-guessing."

Thus, in *Summers*, the Sixth Circuit ignored controlling Supreme Court precedent and chose not to determine whether Congress intended the FCA's seal requirements to be jurisdictional. Instead, the *Summers* court relied on a citation to *Erickson ex rel. United States v. Am. Inst. of Biological Sciences*, 716 F. Supp. 908, 911 (E.D. Va. 1989), which quoted *McCord* for the proposition that when Congress "creates a new liability and gives a special remedy for it" compliance with any limitations upon that liability is "made essential to the assertion and benefit of the liability itself." But *Erickson* and *Summers* did not acknowledge that *McCord*'s language and holding were modified, first by *New York Steam Fitting* and then by *Fleisher*. *Summers* overlooked the conclusion of both *New York Steam Fitting* and *Fleischer* that, in assessing whether a statutory requirement is jurisdictional, the question is not whether Congress correctly balanced the relevant factors in enacting a statutory requirement; the question is whether Congress intended that statutory requirement to be jurisdictional in the first place.

[5] *See also Farzana K. v. Indiana Dept. of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) ("The law is full of rules that are mandatory in the sense that courts must enforce them punctiliously if a litigant insists. Rules are not jurisdictional, however, no matter how unyielding they may be, unless they set limits on the federal courts' adjudicatory competence.") (citation omitted).

Accordingly, *Summers* misapplied the applicable Supreme Court precedent. *Summers* did not address the relevant factors in deciding whether a statutory provision is jurisdictional. *Lujan*'s test does, and it correctly determined that the seal provision is not jurisdictional.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Certify the Court's Order and Memorandum Opinion for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) should be denied.

THIS the 24th of February, 2011

Respectfully submitted,

/s/ C. Maison Heidelberg

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CERTIFICATE OF SERVICE

I, C. Maison Heidelberg, attorney for Cori Rigsby and Kerri Rigsby, do hereby certify that I have this 24th day of February, 2011 caused the foregoing document to be filed with the Court's CM/ECF system, which will cause notice to be delivered to all counsel of record.

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EXHIBIT 1

Scoy v. New Albertson's Inc., No. 2:08-cv-02237-MCE-KJM, 2011 BL 33084 (E.D. Cal. Feb. 09, 2011)

United States District Court, E.D. California.

ANDREA VAN SCOY, LYNDA AZEVEDO, DIANA MURDOCK, CHRISTINA CARNES; MINA JO GUERRERO, MIRACLE JOHNSON, ROSANNE LAZUKA, PATRICIA LOGAN, TERESA LYON, THERESA ORTH and MARA GRACE SMITH, Plaintiffs, v. NEW ALBERTSON'S INC., ALBERTSON'S, INC., SAVE-MART SUPERMARKETS, INC., LUCKY'S INC.; and DOES 1 through 25, inclusive, Defendants.

No. 2:08-cv-02237-MCE-KJM.

February 9, 2011

ORDER

MORRISON ENGLAND JR., District Judge

On December 13, 2010, this Court issued its Order denying Plaintiffs' Motion to Remand. Plaintiffs subsequently filed a Motion for Certification of Interlocutory Appealability under 28 U.S.C. § 1292(b).[fn1]

*[*2]*

That Motion, which is now before the Court, asks that the Court certify for immediate appeal its decision denying remand on grounds that said decision both "presents controlling questions of law as to which there is substantial ground for difference of opinion" and involves circumstances where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The Ninth Circuit is clear in directing that resort to immediate appeal under Section 1292(b) should be used only in "exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982). Instead, as Ninth Circuit precedent has recognized, interlocutory appeal should be "applied sparingly". Id. In order to justify the appellate shortcut represented by interlocutory appeal, its proponent has the the burden to show that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

Here, the Court does not believe that either prong of Section 1292's test justifies the

procedural deviation of permitting immediate appeal, particularly given the high bar the Ninth Circuit has set for the certification of such an appeal before a case has otherwise been concluded. ***[*3]***

First, in the Court's view, Plaintiffs have not established, as they must, that there is any controlling issue of law presented by the decision as to which there exists any substantial ground for difference of opinion. The preemptive force of the Labor Management Relations Act, 29 U.S.C. § 141 et seq. ("LMRA"), is strong with respect to any state claim whose outcome may hinge on consideration of the CBA. See Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 997 (9th Cir. 1987). The collective bargaining agreements ("CBAs") between Save Mart and its employee union organizations govern, among other things, work assignments, promotions, transfers and discipline. As indicated in the Court's Order denying remand, Plaintiffs' contentions herein include claims that they were unfairly denied promotions that instead went to African-American employees and further were subject to disciplinary measures disparate than those employed for their black counterparts. The viability of those contentions, as well as Raley's defenses thereto, necessarily require interpretation of the applicable CBAs. The Court is not persuaded by Plaintiffs' apparent claim that the CBAs are not squarely implicated by such claims, since the claims at issue, by their nature, will require actual interpretation of the CBAs' provisions, or their omissions with regard to the allegations being made. Particularly given the force of preemption that must be applied in cases like this one which invoke the provisions of the LMRA, the Court believes interlocutory certification is not indicated since the law as it applies to this question is well-settled. ***[*4]***

Nor is Plaintiffs' argument that the result should change because the claims of some Plaintiffs may not require consideration of the CBAs any more persuasive. In cases involving multiple plaintiffs, the court may exercise supplemental jurisdiction over additional claims so long as it has original jurisdiction over a single plaintiff. O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 580-81 (6th Cir. 2009) (citing Lindsay v. Gov't Employees Ins. Co., 448 F.3d 416, 423 (D.C. Cir. 2006).

The Court's proper exercise of supplemental jurisdiction also implicates the second Section 1292(b) factor: whether or not an immediate appeal will ultimately advance the termination of this litigation. Here, the case has been pending before this Court since May 8, 2008, a period of more than two-and-a-half years. Two motions for summary judgment have been adjudicated. There is no indication that remand of the matter to state court will do anything other than substantially delay the resolution of the case.

Because neither factor that must be demonstrated under 28 U.S.C. § 1292(b) justifies interlocutory appeal in this matter, and because both prerequisites must be established before certification of such an appeal should issue, the present Motion for Certificate of Appealability (ECF No. 94) is hereby DENIED.

IT IS SO ORDERED.

Dated: February 8, 2011

[fn1] Because oral argument was not of material assistance, the Court ordered this matter

submitted on the briefs. E.D. Cal. Local Rule 230(g).

EXHIBIT 2

Blue Cross & Blue Shield of Rhode Island v. Korsen, C.A. No. 09-317L., 2011 BL 13888 (D.R.I. Jan. 19, 2011)

United States District Court, D. Rhode Island.

BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, Plaintiff, v. JAY S. KORSEN and IAN D. BARLOW, Defendants.

C.A. No. 09-317L.

January 19, 2011

MEMORANDUM AND ORDER

RONALD LAGUEUX, Senior District Judge

This matter is before the Court on Plaintiff's Motion for Reconsideration or, in the alternative, to Certify the Court's interlocutory order for immediate appeal to the First Circuit, pursuant to 28 U.S.C. § 1292(b). Plaintiff urges the Court to reexamine its October 27, 2010, ruling in this case, [fn1] which denied Plaintiff's motion to remand the matter to State court. For reasons explained below, the Court denies Plaintiff's motions.

Plaintiff Blue Cross & Blue Shield of Rhode Island ("Blue Cross") initially sued two health care providers, Defendants Jay Korsen, a chiropractor, and Ian D. Barlow, an occupational therapist, in Rhode Island Superior Court in June 2009. Blue Cross's Complaint alleges four state law causes of action *[*2]* resulting from a billing dispute over services rendered by Defendants to Blue Cross subscribers. Blue Cross alleges that Defendants treated its subscribers with motorized massage equipment, a non-covered service, but then misidentified the service as "mechanical traction" in its bills to Blue Cross in order to obtain compensation for an unauthorized service. This practice, which Blue Cross alleges was knowingly fraudulent, went on for over six years, involved charges made in connection with over 1500 patients, and resulted in wrongful payments to Defendants of $412,952.93. In a counterclaim, Defendants allege that Blue Cross attempted to recoup the disputed funds by withholding payment on subsequent unrelated claims submitted by Defendants.

Count I of Plaintiff's Complaint alleges that Defendants breached their (separate) Provider Agreements with Plaintiff, by submitting claims for unauthorized services, and, in the case of Defendant Korsen, by terminating the Provider Agreement without proper notice to Blue Cross. Count II is for fraud based on false and fraudulent claims submitted by Defendants for compensation. In Count III, Blue Cross alleges that Defendant Korsen made defamatory statements accusing Blue Cross of embezzling funds from him. Count IV states a claim for

tortious interference with advantageous relationships, alleging that Korsen communicated directly with entities that do business with ***[*3]*** Blue Cross in an effort to damage its business relationships.

Defendants removed the case to this Court arguing that Blue Cross' state law claims for breach of contract and fraud are completely preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* On Plaintiff's motion to remand, this Court concurred with Defendants that Counts I and II of Plaintiff's Complaint are completely preempted by ERISA, which operates to convert the two counts into a single ERISA claim, pursuant to 29 U.S.C. § 1132(a)(3). Consequently, the Court held that Defendants had made a colorable showing that the Court has original subject matter jurisdiction over the lawsuit, and that it is properly removable, pursuant to 28 U.S.C. § 1441(b).

The Court's reasoning

In a nutshell, this Court arrived at its holding that Plaintiff's Counts I and II are completely preempted by ERISA in reliance on the Supreme Court's decision in Aetna Health Inc. v. Davila, 542 U.S. 200 (2004). Davila sets forth a two-part test to determine when a state law claim is completely preempted by ERISA: 1) Could the claim have initially been brought under ERISA's provision § 502(a)?[fn2] and 2) Is there no independent legal duty violated by defendant's action? If the answer to both questions is "yes," then the state law claim is completely ***[*4]*** preempted; that is, converted to an ERISA claim. 542 U.S. at 210.

ERISA's section 502(a)(3) provides for ERISA Plan participants, beneficiaries or fiduciaries to bring civil actions to enjoin any practice which violates ERISA or the Plan, or to obtain equitable relief. 29 U.S.C. § 1132(a)(3). Finding first that Blue Cross is an ERISA fiduciary, this Court held that Blue Cross could have fashioned its breach of contract and fraud claims as an action to enforce the terms of the applicable ERISA Plans. The terms of the ERISA Plans establish which medical services are covered and which are not — the crux of this dispute.

This Court next considered the Provider Agreements between Blue Cross and the Defendants to determine whether or not these Agreements set forth an independent legal duty separate from the ERISA Plans. The Provider Agreements import terms, concepts and definitions from the ERISA Plans, particularly in the area of what constitutes covered medical services. As a result, it is impossible to conclude that the Provider Agreements outline legal duties that are wholly independent from the ERISA Plans. The application of Davila's two-part test, then, led this Court to hold that Blue Cross's claims for breach of contract[fn3] and fraud ***[*5]*** were both completely preempted by ERISA.

Plaintiff's Motion for Reconsideration

Plaintiff has titled its Motion as one for Reconsideration, yet its argument focuses on its alternative request for certification for an interlocutory appeal. As Defendants have pointed out, a successful Motion for Reconsideration generally relies upon newly-available evidence or a demonstration that the Court made a clear error of law. Palmer v. Champion Mortgage, 465 F.3d 24, 30 (1st Cir. 2006). Although Blue Cross argues that the Court has

misapprehended and misapplied Davila, it presents nothing new in connection with its argument. Given nothing novel to reconsider, the Court stands fast. Plaintiff's Motion to Reconsider is hereby denied.

Plaintiff's Motion to Certify

Plaintiff seeks the Court's authorization to allow the issue of federal subject matter jurisdiction to be certified for immediate appeal to the First Circuit, pursuant to 28 U.S.C. § 1292(b). Although there are certain limited exceptions, "[t]he general rule is that interlocutory orders are not immediately reviewable but must await final judgment." Awuah v. Coverall North America, Inc., 585 F.3d 479, 480 (1st Cir. 2009). The exception provided in 28 U.S.C. § 1292(b) permits a district ***[*6]*** judge to apply to the Court of Appeals for review if the following criteria are met: 1) the interlocutory order involves a controlling issue of law; 2) that issue provides a "substantial ground for difference of opinion;" and 3) an immediate appeal may hasten the resolution of the lawsuit. The party moving must persuade first the district judge, then the Court of Appeals, that all three criteria are met. Even then, the decision to send the appeal to the Court of Appeals, and the decision by the Court of Appeals to accept it, are discretionary. Ungar v. the Palestinian Authority, 228 F.Supp. 2d 40, 50 (D.R.I. 2002); Cummins v. EG & G Sealol, Inc., 697 F.Supp. 64, 68 (D.R.I. 1988).

1) Controlling issue of law

There can really be no dispute that the issue of federal subject matter jurisdiction is a controlling, if not dispositive, issue of law in this litigation. A determination that Counts I and II of Plaintiff's Complaint are completely preempted by ERISA results in this case going forward in federal court, with one ERISA count and two supplemental state claims. Moreover, because ERISA provides for equitable relief only, Plaintiff is no longer eligible for compensatory damages for the two preempted counts. 29 U.S.C. § 1132. On the other hand, a present determination that Counts I and II are not completely preempted by ERISA would result in the remand of this case to Rhode Island Superior Court, with the possibility of an award of compensatory damages for the ***[*7]*** prevailing party, or the possibility of the dismissal of the lawsuit in its entirety based upon ERISA's section 514(a), 29 U.S.C. § 1144(a). If, after a trial on this matter in this federal Court, the First Circuit determines on appeal that ERISA complete preemption is not proper, the Court's jurisdictional decision would constitute reversible error, and the matter would then be remanded to state court. Accordingly, this legal issue is a controlling one.

2) Substantial ground for difference of opinion

For this prong of the § 1292 certification test, Plaintiff reiterates its earlier arguments that: a) it could not have brought its claims under § 502 because it lacks the requisite standing; and b) that the Provider Agreements comprise a set of obligations between the parties that are independent of, and must be analyzed apart from, the ERISA Plans. While Blue Cross' status as an ERISA fiduciary, as well as its correspondent right to bring a civil action pursuant under 29 U.S.C. 1132(a)(3), seem indisputable to the Court, Plaintiff's second argument is a compelling one.

Plaintiff explains that the ERISA Plans in question include mechanical traction as a covered benefit, but provide no further description as to what constitutes mechanical traction. Whether or not the definition of mechanical traction includes treatment with motorized massage equipment will have to be resolved, not by ***[*8]*** reference to the ERISA Plans, but by medical evidence and expert testimony. In a Ninth Circuit case cited by Plaintiff to support its argument, the Court wrote, "Where the meaning of a term in the Plan is not subject to dispute, the bare fact that the Plan may be consulted in the course of litigating a state-law claim does not require that the claim be extinguished by ERISA's enforcement provision." Blue Cross of California v. Anesthesia Care Assoc., 187 F.3d 1045, 1051 (9th Cir. 1999); see also Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136, 141 (1st. Cir. 2000). Plaintiff has submitted additional cases where courts have found the connection between the ERISA Plan and the disputed issue in the litigation to be sufficiently attenuated to avoid complete preemption: Aetna Health Inc. v. Srinivasan, 2010 WL 5392697, Slip Copy, p. 3 (D.N.J. 2010) (". . . what is critical to Plaintiff's claims is not what benefits the plan participants were entitled to under their ERISA plans but the relationship between Plaintiff and its out-of-network and in-network providers."); and Horizon Blue Cross Blue Shield of N.J. v. East Brunswick Surgery Ctr., 623 F.Supp.2d 568 (D.N.J. 2009), which also concerned allegedly fraudulent claims submitted to the insurer by out-of-network providers.

This Court previously concluded that the dispute over the definition of mechanical traction was sufficiently intertwined with the notion of covered benefits as set forth in the ERISA ***[*9]*** Plans to justify complete preemption, and consequently to establish a colorable basis for federal subject matter jurisdiction. The Court has not changed its mind. However, the Court is willing to concede that this area of the law appears to be unsettled and that there exist substantial grounds for a difference of opinion on this issue.

c) Would an interlocutory appeal "materially advance the ultimate termination of the lawsuit?"

In response to this question, Plaintiffs argue that there is no guarantee of an expeditious resolution of this case in federal court given the difficulties that the parties have experienced in trying to agree upon a procedural schedule. Moreover, the consequences of a reversal of this Court's decision on appeal would mean a whole new trial in State court, with new legal theories and potentially contradictory evidentiary standards.

Defendants counter that the lawsuit is ordinary and simple, and not the kind of exceptional or rare case for which § 1292 certification is to be sparingly applied. In addition, an interlocutory appeal would halt the progress of the lawsuit, while the issue of jurisdiction is being considered by the First Circuit. Defendants quote this Court's earlier decision stating that section "1292(b) review should only be granted in rare cases where the savings of costs to the litigants and increase in judicial efficiency is great." Cummins, 697 F.Supp. at 68.

[*10]

This Court agrees with Defendants that this is not that rare case of "prolonged litigation for which a piecemeal appeal is justified." Thompson Trading Ltd. v. Allied Lyons PLC, 124 F.R.D. 534, 538 (D.R.I. 1989). The issues in this case appear to be straightforward, and the Court anticipates that several of the claims may fall into place when the central dispute over

the definition of mechanical traction is resolved. An interlocutory appeal at this juncture in the litigation would not advance the resolution of this lawsuit; on the contrary, it would delay its termination.

Conclusion

For all these reasons, the Court denies Plaintiff's Motion to Reconsider its earlier ruling on federal subject matter jurisdiction pursuant to ERISA, and denies Plaintiff's Motion to Certify the matter for interlocutory appeal.

It is so ordered.

January 19, 2011

[fn1] This decision, including a more extensive recitation of the factual background of the case, may be found under the same caption at ___ *F.Supp.2d* ___ (D.R.I. 2010), *2010 WL 4230811*.

[fn2] 29 U.S.C. § 1132(a).

[fn3] The portion of Count I that alleges that Korsen breached the Provider Agreement when he terminated it without insufficient notice is not completely preempted by ERISA. Likewise, Plaintiff's Counts III and IV are not subject to ERISA's complete preemption.

EXHIBIT 3

Greenwood v. Compucredit Corp., No. 08-04878 CW, 2011 BL 20041 (N.D. Cal. Jan. 05, 2011)

United States District Court, N.D. California.

WANDA GREENWOOD; LADELLE HATFIELD; and DEBORAH McCLEESE, on behalf of themselves and others similarly situated, Plaintiffs, v. COMPUCREDIT CORPORATION; COLUMBUS BANK AND TRUST, jointly and individually, Defendants.

No. 08-04878 CW.

January 5, 2011

ORDER DENYING DEFENDANTS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

(Docket No. 351)

CLAUDIA WILKEN, District Judge

Defendants Compucredit Corporation and Columbus Bank and Trust Company move for an order certifying an interlocutory appeal of one issue: "whether absent class members asserting a violation under California's unfair competition law ("UCL") Bus. & Prof. Code, § 17200 et. seq. must satisfy Article III standing in federal court." Docket No. 351, Defs.' Mot. at 5. Defendants further request that the Court stay proceedings in the case pending determination of the interlocutory appeal. Plaintiffs oppose the motion. Having considered all of the papers submitted by the parties, the Court DENIES Defendants' motion.

*[*2]*

BACKGROUND

In the present action, Plaintiffs allege that Defendants used fraudulent mass mail solicitations to market and issue a credit card in violation of California's Unfair Competition Law (UCL), Cal. Bus. and Prof. Code § 17200 et seq. On January 19, 2010, the Court certified the Plaintiff class. Docket No. 209. On November 19, 2010, the Court denied Defendants' motion to decertify the class. Defendants based their motion largely on the Eighth Circuit's decision in Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023 (8th Cir. 2010), which held that absent class members alleging fraud in violation of the UCL were required to present individualized evidence of reliance on the alleged misrepresentations to establish Article III standing. Avritt did not persuade the Court to decertify the class given well-established law that in class

actions only the named plaintiff need provide individualized evidence of standing. Plaintiffs here established Article III standing based on evidence of the named Plaintiff's reliance, satisfaction of Rule 23 requirements, and the presumption of reliance that applies to absent class members, who by definition received the allegedly deceptive solicitations and paid money toward the credit card.

LEGAL STANDARD

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an appeal of an interlocutory order only if three factors are present. First, the issue to be certified must be a "controlling ***[*3]*** question of law." 28 U.S.C. § 1292(b). Establishing that a question of law is controlling requires a showing that the "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982) (citing U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)).

Second, there must be "substantial ground for difference of opinion" on the issue. 28 U.S.C. § 1292(b). This is not established by a party's strong disagreement with the court's ruling; the party seeking an appeal must make some greater showing. Mateo v. M/S Kiso, 805 F. Supp. 792, 800 (N.D. Cal. 1992).

Third, it must be likely that an interlocutory appeal will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); Mateo, 805 F. Supp. at 800. Whether an appeal may materially advance termination of the litigation is linked to whether an issue of law is "controlling" in that the court should consider the effect of a reversal on the management of the case. Id. In light of the legislative policy underlying § 1292, an interlocutory appeal should be certified only when doing so "would avoid protracted and expensive litigation." In re Cement, 673 F.2d at 1026; Mateo, 805 F. Supp. at 800. If, in contrast, an interlocutory appeal would delay resolution of the litigation, it should not be certified. See Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988) (refusing ***[*4]*** to hear a certified appeal in part because the Ninth Circuit's decision might come after the scheduled trial date).

"Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n. 6 (9th Cir. 2002). Thus, the court should apply the statute's requirements strictly, and should grant a motion for certification only when exceptional circumstances warrant it. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). The party seeking certification of an interlocutory order has the burden of establishing the existence of such exceptional circumstances. Id. A court has substantial discretion in deciding whether to grant a party's motion for certification. Brown v. Oneonta, 916 F. Supp. 176, 180 (N.D.N.Y. 1996) rev'd in part on other grounds, 106 F.3d 1125 (2d. Cir. 1997).

DISCUSSION

Defendants' motion for certification fails for various reasons. First, the issue Defendants seek to appeal is not controlling because even if certification of the class were reversed, the individual claims would survive.

Second, Defendants have failed to identify substantial grounds for a difference of opinion. Defendants concede that Avritt is the first federal appellate analysis of the interplay between the decision in In re Tobacco II, 46 Cal. 4th 298 (2009), and Article III standing requirements. This decision alone fails ***[*5]*** to create a split of authority among the circuits. Furthermore, as explained in greater detail in the order denying Defendants' motion seeking class decertification, substantial controlling authority provides that Article III requirements are met in a class action if at least one named plaintiff produces sufficient evidence of standing, and Rule 23 is satisfied.

Third, certification in this case would not "materially advance the ultimate termination of the litigation;" rather it would delay resolution of the litigation. On April 21, 2011, the Court will hear the parties' motion for summary judgment, with trial set for August, 2011. Docket No. 359. An appeal on this matter is not likely to prevent protracted and expensive litigation. Defendants sought a permissive appeal of the Court's class certification decision pursuant to Federal Rule of Civil Procedure 23(f). Defendants' petition included the issue they seek to raise if granted certification to file an interlocutory appeal. The Ninth Circuit, however, denied Defendants' petition. Though there is no res judicata effect resulting from the denial of Defendants' petition, and Avritt was decided after that denial, Defendants have not presented exceptional circumstances that warrant a departure from the general rule that only final judgments are appealable. ***[*6]***

CONCLUSION

Accordingly, the Court DENIES Defendants' motion for certification and to stay the proceedings. Docket No. 351. The hearing on this motion, set for January 13, 2011, is vacated.

IT IS SO ORDERED.

EXHIBIT 4

Morales v. Farmland Foods, Inc., No. 8:08CV504., 2011 BL 25881 (D. Neb. Feb. 01, 2011)

United States District Court, D. Nebraska.

MARIA GUZMAN MORALES, on behalf of themselves and all other similarly situated individuals, and MAURICIO GUAJARDO, on behalf of themselves and all other similarly situated individuals, Plaintiffs, v. FARMLAND FOODS, Inc., Defendant.

8:08CV504.

February 1, 2011

MEMORANDUM AND ORDER

JOSEPH BATAILLON, Chief District Judge

This matter is before the court on the following motions: motion for partial summary judgment by defendant, Filing No. 133; motion for partial summary judgment by defendant, Filing No. 137; motion for partial summary judgment by defendant, Filing No. 139; motion for partial summary judgment by defendant, Filing No. 141; motion for partial summary judgment by defendant, Filing No. 143; motion to dismiss by defendant, Filing No. 165; motion to dismiss by defendant, Filing No. 169; motion for summary judgment by defendant, Filing No. 175; motion to dismiss by defendant, Filing No. 179; motion for partial summary judgment by plaintiffs Mauricio Guajardo and Maria Guzman Morales, Filing No. 192; and motion to amend and for interlocutory appeal by defendant, Filing No. 223.

Plaintiffs, employees at defendant's slaughter and processing facility located in Crete, Nebraska, filed this case alleging they are entitled to unpaid wages and overtime wages for time spent donning, doffing, and washing clothes/personal protective equipment; time spent walking to and waiting at the meat production line after donning or washing; and time spent walking from the meat production line and waiting to doff clothing/personal *[*2]* protective equipment. Filing No. 1. Plaintiffs assert that defendant compensates them on a "gang time" basis, meaning that plaintiffs receive compensation only for the time plaintiffs are on the meat production line and meat actually moves down the line.

STANDARD OF REVIEW

Summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to the nonmoving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. If the moving party meets the initial burden, the burden then shifts to the opposing party to produce evidence of the existence of a genuine issue for trial. Id. at 324.

"The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A "genuine" ***[*3]*** issue of material fact exists "when there is sufficient evidence favoring the party opposing the motion for a jury to return a verdict for that party." Id. at 249-52 (noting the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law). If "reasonable minds could differ as to the import of the evidence," summary judgment should not be granted. Id. at 250-51.

The evidence must be viewed in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all reasonable inferences. *Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003). "In ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations." *Id.* "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir. 2004).

DISCUSSION

A. Filing No. 133

Defendant asks this court to dismiss all overtime pay claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, for a number of required activities, including: swiping in; walking or waiting; carving with light tools; use of draw knives — defendant argues that these items were not used by any of the named plaintiffs; harness and belts — defendant claims there is no evidence and very few employees use these; and sharpening or steeling knives — defendant argues plaintiffs already get paid for this time. These acts, argue defendant, are preliminary activities and not compensable under the Portal-to-Portal Act, 29 U.S.C. § 254(a).

[*4]

Plaintiffs ask this court to deny the motion for partial summary judgment. Filing No. 196. Plaintiffs contend that they swipe in after the first principal work activity of the day, which is gathering and donning their protective work equipment. Further, plaintiffs contend that they have submitted evidence that they do in fact clean, sharpen and steel the knives and

equipment they use. In addition, the plaintiffs argue that nearly all of the facts set forth by the defendant are in fact controverted and must go to trial. The court has carefully reviewed the briefs, evidence and argument. The court agrees with the plaintiffs that these issues are factual in nature and should proceed to court.

B. Filing No. 137

Defendant moves for summary judgment on the basis that the claims of the named plaintiffs and the opt-in plaintiffs are based on events which allegedly occurred more than two years ago and are thus barred by the statute of limitations. *See* 29 U.S.C. § 257 and § 255(a) (FLSA) (two-year statute of limitations unless violation is willful). Defendant argues that the claims of 27 of the plaintiffs are filed as consents more than two years after their last day of employment with the defendant. Additionally, in any event, defendant argues that the court should dismiss all claims that occurred after three years pursuant to 29 U.S.C. § 255(a).

Plaintiffs ask the court to deny the motion and contend that the defendant did in fact deliberately ignore the legal obligations under the compensation scheme and, therefore, the three-year statute of limitations applies. Again, the court finds the argument of the plaintiffs is correct. There are significant disputes as to the behavior of the defendant, and it is a jury question at this point as to whether defendant acted in a willful manner. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Accordingly, the court will ***[*5]*** deny this motion until the evidence is adduced at trial, at which time the defendant may raise this issue again if appropriate.[fn1]

Filing No. 139

Defendant also moves for summary judgment against the class plaintiffs who allegedly do not fit within the class definition. Defendant contends that certain of the opt-in plaintiffs did not hold the jobs designated as part of the class, and certain members did not hold the jobs during the relevant time period. According to defendant, fourteen plaintiffs never held these positions and thirty-six did not hold the jobs in the relevant time period. Plaintiffs argue that these allegations are incorrect. First, plaintiffs contend that this is a damages question to be decided at trial. Second, plaintiffs cite to evidence indicating that nearly all of the fourteen plaintiffs appear to be appropriate class members as do the thirty-six plaintiffs. The court agrees there are genuine issues of material fact on this issue and will allow it to proceed to trial. If at trial it appears that one or more of these plaintiffs are not part of the class, the court will be receptive to an appropriate motion.

Filing No. 141

Defendant also moves for summary judgment as to those non-unique items that plaintiffs were required to don and doff. In short, defendant asks this court to dismiss all items that are generic as not compensable work time under the Portal-to-Portal Act, 29 U.S.C. § 254(a); *see, e.g., Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 783 (8th Cir. 2009). Plaintiffs argue that there is significant evidence in the record to dispute the ***[*6]*** arguments of the defendant. In addition, plaintiffs note that additional depositions have been taken that will also support their arguments. At the time of the briefing, plaintiffs had not yet received copies of these

depositions. Plaintiffs note that the correct legal inquiry is not whether these are unique or non-unique times, but whether the activities are integral and indispensable to the principal work activity. *See IBP v. Alvarez*, 546 U.S. 21, 33-34 (2005). The parties clearly dispute what constitutes the beginning and end of their work day. The court agrees and will allow this issue to proceed to trial.

Filing No. 143

Defendant also moves for summary judgment arguing that the claims based on time in excess of "reasonable time" and de minimum activities should be dismissed. The issues raised in this filing are virtually the same as those raised in Filing No. 133, with the difference being that this motion relates to overtime. The court has already determined that these issues will continue to trial. Accordingly, this motion is likewise denied.

Filing Nos. 165 and 169

Defendant moves to dismiss this case or in the alternative for summary judgment against plaintiff Maria Guzman Morales and other plaintiffs for failing to disclose her alleged claims against Farmland in bankruptcy. Following the signing of a consent but before filing of this lawsuit, Maria Guzman Morales apparently filed for bankruptcy. She failed to list this potential claim in her schedules and her bankruptcy was discharged. Plaintiffs contend that Ms. Morales does not speak English and did not understand that she had to file this potential case in bankruptcy court. A similar scenario apparently occurred with several of the plaintiffs. She and the other plaintiffs are willing to reopen their bankruptcy cases if necessary. The defendant has not submitted any evidence that any of the plaintiffs intended to defraud the court, and thus judicial estoppel is not appropriate. ***[*7]*** *See Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n. 6 (8th Cir. 1987). The court notes that the plaintiffs did not become a party in this lawsuit until after the bankruptcy was discharged or a plan confirmed. Further, it is questionable whether plaintiffs have gained any advantage in any event, as any judgment, or portion of a judgment, might prove to be exempt under Neb. Rev. Stat. § 25-1552. Finally, the court notes that the defendant has waited a considerable amount of time to make this objection. The court agrees with the plaintiff. *See United States ex. rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909, 913 (8th Cir. 2001) (property of bankruptcy estate includes all causes of action debtor could have brought at time of bankruptcy petition). Such assets are not abandoned by the case closing because they were not scheduled or "otherwise administered." 11 U.S.C. § 554(c). The court shall allow the plaintiffs to reopen their bankruptcy cases and allow the trustee to determine if he/she wants to pursue these claims or not. The court will deny the motion to dismiss/summary judgment and allow those plaintiffs who filed bankruptcy to reopen their bankruptcy cases and file these claims. The bankruptcy court can determine if these plaintiffs have the right to continue this lawsuit in their names, or if a trustee shall consider the claims, or if the bankruptcy court chooses to abandon these claims.

Filing No. 175

Defendant also moves to dismiss plaintiff Mauricio R. Guajardo's overtime pay claims under the FLSA. Defendant contends that Guajardo's claims fail to the extent they are based on

tools he carried in his employment as they were light tools and not work tools. Defendant also argues that the statute of limitations applies and that Guajardo never held any of the jobs in this class definition. The court has already addressed both of these issues and need not do so again. ***[*8]***

Filing No. 179

Defendant moves to dismiss or for summary judgment against plaintiff Sebastian Alfaro who also failed to disclose his bankruptcy case. The court has already addressed this issue and the same analysis and requirements will apply to this plaintiff.

Filing No. 192

Plaintiffs move for partial summary judgment asking this court to find that the defendant has in fact violated the FLSA by failing to pay hourly production workers for all the hours worked. Defendant contends that it adequately pays the plaintiffs for the time worked. Plaintiffs contend they are not paid for this time. As the plaintiffs have argued in their opposition to the defendant's motions for summary judgment, these are factual issues better left for trial.

Filing No. 223

Defendant moves the court to amend its August 16, 2010 order, Filing No. 208, to: (1) grant it summary judgment on time spent donning or doffing certain items (namely, sweatshirts, pants, coveralls, and T-shirts), and as to time spent washing the person; and (2) to certify to the Eighth Circuit on interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the issue of defining "clothes" and "washing" so the Eighth Circuit can decide if the terms are exemptions or definitions.

28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. ***[*9]***

28 U.S.C. § 1292(b). A district court must find that an order meets three criteria to be immediately appealable under § 1292(b): (1) the order must involve a controlling question of law; (2) there must be a substantial ground for difference of opinion as to the issue in question; and (3) certification must materially advance the ultimate termination of the litigation. *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) (citing *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (*citing White v. Nix,* 43 F.3d 374, 377 (8th Cir. 1994)). The district court must address all three criteria when certifying an issue for interlocutory appeal pursuant to § 1292(b). *White,* 43 F.3d at 377 ("[W]e hold that the district court abused its discretion by failing adequately to consider all the relevant criteria before granting the motion for certification."). Defendant argues these are both pure questions of law.

Second, defendant contends that there is disagreement in the Fourth, Fifth, Seventh and Eleventh Circuits with regard to the meaning of clothes and washing versus the view taken by the Ninth Circuit. Finally defendant argues that allowing the Eighth Circuit to make these determinations will substantially alter and shorten this litigation.

Plaintiffs oppose this motion. Filing No. 238. Plaintiffs argue that this court has already ruled on these issues in its previous order on summary judgment. In addition plaintiffs note that defendant has filed numerous additional motions to which plaintiffs have been forced to respond. Plaintiffs argue that the Eighth Circuit does not favor "piece-meal" appeals. See White, 43 F.3d at 376 ("It has, of course, long been the policy of the courts to discourage piece-meal appeals because most often such appeals result in additional burdens on both the court and the litigants. Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination."). *See Union County, Iowa v. **[*10]** Piper Jaffray & Co., Inc.*, 525 F.3d 643 (8th Cir. 2008) (the party requesting an interlocutory appeal "bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted.") (citing to White, 43 F.3d at 376).

The court agrees with the plaintiffs. The court has decided the clothing and washing issues to the extent necessary for trial. Additional issues may arise at trial where in the court might revisit the issues of clothing and washing, depending on the development of the evidence. As currently set forth in the claims in this case, these issues are both factual and legal. Testimony will determine what is part of the continuous workday and what is not and what are or are not the beginning and ending principal activities. But for the moment, and until the evidence is reviewed during trial, the court has sufficiently addressed these issues.[fn2]

With regard to the request for interlocutory appeal, the court will deny the motion. The fact that the Eighth Circuit has not decided this issue is not sufficient to justify the interlocutory appeal. *See Union County*, 525 F.3d at 647 (". . . we do not see how the court's only stated reason for certifying the appeal — the lack of Eighth Circuit precedent — demonstrates that this requirement [for interlocutory appeal] has been met."). As plaintiffs point out, the defendant has filed numerous motions to which they have had to respond. Now, defendant is attempting to perfect an interlocutory appeal which will further delay the case and cause additional expense to the plaintiffs. See Cortez v. Nebraska Beef, Inc., No. 8:08CV90, 8:08CV99 (D. Neb. April 14, 2010) (J. Bataillon) (denying interlocutory appeal because "[t]he court agrees with the plaintiffs that these ***[*11]*** cases involve routine wage and hour violations" and that "defendants are free to appeal these issues following trial."). Additionally, the court has already found that these questions as currently posed to the court are mixed questions of fact and law.

THEREFORE, IT IS ORDERED:

1. Defendant's motions for summary judgment/motions to dismiss/motion for interlocutory appeal, Filing Nos. 133, 137, 139, 141, 143, 165, 169, 179, 192, and 223, are denied.

2. Plaintiffs who filed bankruptcy wherein the claims in this litigation should have been included are hereby given 30 days from the date of this order to reopen their cases in bankruptcy or file whatever is required. Thereafter, the plaintiffs shall give the court a written

status report to be filed in CM/ECF outlining what measures, if any, are being taken by the bankruptcy court and/or the bankruptcy trustee, pursuant to the discussion set forth in this memorandum and order.

3. Plaintiffs' motion for summary judgment, Filing No. 175, is denied.

DATED this 1st day of February, 2011.

[*] This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

[fn1] Defendant argues that there might be two plaintiffs who are barred by the three-year statute of limitations and refers to a Vesely Declaration. However, the court is unable to connect the references with particular filing numbers and exhibits. Possibly there is a missing index of evidence. Accordingly, if the defendant wishes to file a motion for summary judgment with regard to these specific plaintiffs, fully supported by evidence, then it may do so. The plaintiffs may thereafter file a response, and the court will consider this very narrow issue. However, the court is not interested in another barrage of filings and arguments. On the contrary, if defendant chooses to address this issue, the court expects the filings to be succinct and to the point and relevant only to this question.

[fn2] If the defendant intended these issues to be purely legal ones, it would have been better advised to not raise the numerous and extensive motions in the context of so many factual situations.